STATE OF MICHIGAN

COURT OF APPEALS

DACIA MATUSZEWSKI,

Plaintiff-Appellant,

v

CENTRAL MICHIGAN INNS, INC., d/b/a HOLIDAY INN,

Defendant-Appellee.

UNPUBLISHED
August 16, 2005

No. 253252
Isabella Circuit Court
LC No. 03-002255-NO

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the circuit court's order granting defendant summary disposition under MCR 2.116(C)(10). This case arises from an injury plaintiff allegedly suffered when a planter on which she was sitting fell over and landed on her right leg. We reverse and remand for further proceedings consistent with this opinion.

On February 15, 2001, plaintiff, a college student, and some of her sorority sisters visited a nightclub located on the premises of defendant's hotel. The hotel has a main entrance that leads to the hotel lobby and a second entrance, located on the east side of the hotel that was commonly used by patrons of the nightclub. The east-side entry area was devoid of furnishings except for several decorative planters. The planters were triangular in shape, with an indentation near the floor serving as a "toe kick" and a top wooden ledge that was five or six inches wide. There were no signs present that warned patrons not to rest or sit on the planters.

After leaving the nightclub, plaintiff and a friend waited in the east-side entry area for a ride. Plaintiff testified in her deposition that she had seen other people wait for rides in this area, and the hotel's general manager acknowledged it was an area in which it was reasonable to anticipate people might wait for rides. After a short while, plaintiff and her friend decided to rest on the edge of one of the decorative planters. Plaintiff testified that she had seen others rest on the planters without incident. However, while plaintiff was resting on the planter, the planter tipped forward, trapping plaintiff's right foot and lower leg beneath it as she fell to the ground. Plaintiff's navicular bone in her right foot was fractured, and she required orthopedic care over the next several months. Plaintiff asserts that as a result of her injury she was unable to fully participate in classes, missed work, and was unable to fully enjoy a planned trip with friends.

Defendant moved for summary disposition based on the lack of a material factual dispute. MCR 2.116(C)(10). Defendant asserted that it was unreasonable for plaintiff to sit on a planter not designed as seating instead of moving to the main lobby where seating was available. Defendant also claimed lack of notice that the planters were being, or could be used for seating, as well as lack of a duty to provide seating in the east-side entry area. Plaintiff argued that the focus should be on the danger of the premises given all of the circumstances of the case, and that the reasonableness of plaintiff's actions and her comprehension of the danger posed involved issues of contributory negligence and were questions of fact for a jury. In granting defendant's motion for summary disposition, the trial court concluded the planter was an open and obvious danger without special aspects such that it would comprise an unreasonable hazard.

Plaintiff's sole question on appeal is whether the court erred in concluding as a matter of law that the danger posed was open and obvious. We conclude that a question of fact exists as to whether the danger posed was open and obvious and thus reverse the grant of summary disposition.

We review de novo a motion for summary disposition made under MCR 2.116(C)(10), *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and consider the documentary evidence available to the trial court, including affidavits, pleadings, depositions, and admissions, *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003); MCR 2.116(G)(5). We draw all reasonable inferences in favor of the plaintiff as the nonmoving party. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Premises owners owe a duty to their invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on their property. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A landowner has a duty to warn an invitee against hidden dangers but not dangers that are open and obvious. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263-64; 532 NW2d 882 (1995). A danger or condition of the premises "is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 574; 676 NW2d 213 (2003). When determining whether a danger is open and obvious, the focus must be on the "'condition of the premises,' not the condition of the plaintiff." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004), quoting *Lugo, supra* at 518 n 2. The landowner also has a duty to protect or warn an invitee if, despite invitee's knowledge of the danger, the landowner could have anticipated the harm. *Lugo, supra* at 516.

Plaintiff testified that the planters appeared sturdy, looked like a good place to rest, and appeared capable of holding her weight. Her friend also testified that the planter was heavy and appeared sturdy. Photographs in the lower court record show that an average person might reasonably expect the planters to be substantial in construction, stable, and attached to the walls. Further, the hotel manager admitted that it was reasonable to expect guests to wait for rides in the east-side entry area. However, no provisions were made for seating. Generally, a danger is open and obvious if it is known to the invitee or if the invitee should reasonably be expected to discover it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). The test is objective; a court should determine whether a reasonable person with normal intelligence would have been able to discover the danger and risk upon casual inspection. *Joyce, supra* at 238-239.

In reviewing the facts contained in the record before us, we cannot conclude that a reasonable person of normal intelligence would have been able to discover the danger posed by resting on the planters upon casual inspection. Plaintiff and her friend both testified that they had witnessed others resting on the planters and saw nothing that would indicate that the planters were not stable. The photographic evidence offered by plaintiff illustrates what would appear to a reasonable person with normal intelligence upon casual inspection to be a sturdy, albeit decorative planter, capable of sustaining the weight of plaintiff in the manner plaintiff contends she rested upon the planter. Accordingly, because plaintiff has shown facts proving a material factual dispute regarding the open and obvious nature of the danger posed, the issue should be presented to the trier of fact for resolution.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly